

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

The record included the transcript of the motion hearing held before Administrative Law Judge John D. Clark on February 25, 1997. In addition, the record consisted of the regular hearing, evidentiary depositions taken before the date of the motion hearing, and the documents contained in the Division of Workers Compensation case file.

ISSUES

Respondent requested the Appeals Board to review the following issues:

- (1) Whether the Administrative Law Judge erred when he granted an extension of claimant's terminal date in the Order dated February 25, 1997.
- (2) Whether the Administrative Law Judge erred when he granted an extension of claimant's terminal date in the Order dated May 8, 1997.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The first issue the Appeals Board will address is whether it has jurisdiction to review the two Orders entered by the Administrative Law Judge that are the subject of this appeal. Both of the Orders involve the same subject matter, the granting of claimant's request to extend terminal dates.

This appeal was not brought pursuant to the preliminary hearing statute, K.S.A. 1996 Supp. 44-534a, which limits Appeals Board review of a preliminary hearing order to the jurisdictional issues listed in that statute. This appeal was brought pursuant to K.S.A. 1996 Supp. 44-551(b)(1) that provides for review by the Appeals Board of all acts of the administrative law judge upon timely written request. Therefore, since this is not an appeal from a preliminary hearing order, the Appeals Board has jurisdiction to review both of the subject orders pursuant to K.S.A. 1996 Supp. 44-551(b)(1). See Shain v. Boeing Military Airplanes, 22 Kan. App. 913, 924 P.2d 1280 (1996).

The Appeals Board acknowledges that K.S.A. 1996 Supp. 44-551(b)(1) was amended by the 1997 Legislature effective July 1, 1997. That amendment limits the Appeals Board's jurisdiction to review only final orders entered by the Administrative Law Judge except for preliminary hearing orders entered under K.S.A. 44-534a. See 1997 Kan. Sess. Laws Ch. 125, Sec. 12. Therefore, had the written request for these appeals been filed on or after July 1, 1997, the Appeals Board would not have jurisdiction to review the appeal at this juncture of the proceeding. See Bowen v. Wilson, 93 Kan. 351, Syl. ¶ 2, 144 Pac. 251 (1914).

- (1) The regular hearing was held in this matter on December 19, 1996. The Administrative Law Judge at that time set claimant's terminal date for January 19, 1997, and respondent's terminal date for February 19, 1997. The claimant had taken the deposition of her treating physician, orthopedic surgeon Tyrone Artz, M.D., before the date of the regular hearing. Dr. Artz had released claimant with permanent restrictions and a permanent functional disability rating in August of 1996. Dr. Artz, however, provided claimant with additional

medical treatment and revised claimant's permanent restrictions following claimant's release in August of 1996. This necessitated the respondent to take the deposition testimony of Dr. Artz on January 28, 1997.

During Dr. Artz' second deposition, he expressed extreme displeasure about answering questions in regard to whether the claimant could perform a certain job within the work restrictions he had placed upon her. The doctor's displeasure was directed at the legislature for enacting a law that required that a physician not trained in occupational medicine express an opinion that only occupational medicine physicians were qualified to express.

Following Dr. Artz' second deposition, the claimant on February 5, 1997, filed a motion to extend her terminal date. A hearing was held on February 25, 1997, that resulted in the February 25, 1997, Order granting claimant a terminal date extension to March 25, 1997, and respondent's to April 25, 1997.

Claimant's Application for Hearing filed with the Division of Workers Compensation alleges a date of accident of April 11, 1996. Accordingly, claimant's entitlement to permanent partial disability benefits is contained in the July 1, 1993, amendments to K.S.A. 44-510e. At the regular hearing, claimant was not employed and was, therefore, seeking permanent partial disability benefits based on the work disability test set forth in K.S.A. 44-510e. The work task loss component of this test is required to be in the opinion of a physician. By the time claimant filed her motion for the extension of terminal dates on February 5, 1997, she had failed to obtain a physician's opinion on the work task loss component of the work disability test.

Claimant's attorney argued at the motion hearing that he had been unable to obtain an opinion from Dr. Artz on claimant's loss of ability to perform work tasks. The reason claimant's attorney gave for not obtaining Dr. Artz' opinion was Dr. Artz' expression of displeasure during his second deposition testimony of the necessity of a physician being required to give an opinion in regard to work restrictions and a worker's ability to perform jobs within those restrictions. Following Dr. Artz' second deposition, claimant's attorney had claimant interviewed by a vocational rehabilitation expert for the purpose of developing a list of claimant's work tasks during the 15 years preceding her date of accident for Dr. Artz' review.

Respondent objected to claimant's motion and argued that claimant's reasons for requesting an extension of her terminal date did not satisfy the statutory requirement that good cause be shown. See K.S.A. 44-523(b)(4). Respondent contended that claimant's attorney simply was dilatory and had not presented the required work task loss evidence in the record before claimant's terminal date expired. In fact, by the time the motion hearing was held, the respondent had submitted its case to the Administrative Law Judge for decision. Respondent argued that to now allow the claimant to present evidence on work task loss would be highly prejudicial to the respondent.

The Appeals Board has had the opportunity to previously review on a number of occasions the question of whether or not terminal dates should be extended for good cause shown. In the majority of those decisions, the Appeals Board has affirmed the decision of the Administrative Law Judge. See Henning v. Fort Scott Family Physicians, Docket No. 147,308 (June 1996); Woodworth v. City of Wichita, Docket No. 183,485 (Jan. 1996); and, Newman v. Carlos O'Kellys, Docket No. 176,725 (Nov. 1995). The Appeals Board recognizes the extreme importance of the enforcement of terminal dates for the purpose of the Administrative Law Judges controlling their dockets. Accordingly, the Appeals Board rarely will disturb the Administrative Law Judge's decision on whether or not to extend a terminal date.

The Appeals Board also acknowledges that the Workers Compensation Act mandates that the Administrative Law Judge and the Appeals Board give the parties a reasonable opportunity to be heard and to present evidence. See K.S.A. 44-523(a). In this case, the Appeals Board finds, despite the dilatory actions of claimant's attorney, that justice requires that the Order of the Administrative Law Judge dated February 25, 1997, that extended claimant's terminal date be affirmed.

(2) At the oral argument before the Appeals Board, both the claimant and the respondent agreed that the appeal of the Administrative Law Judge's Order dated May 8, 1997, should be dismissed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated February 25, 1997, should be, and is hereby, affirmed and the appeal of the Order of Administrative Law Judge John D. Clark dated May 8, 1997, is dismissed.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert L. Nicklin, Wichita, KS
Kirby A. Vernon, Wichita, KS
David J. Morgan, Wichita, KS

NANCY J. CUMMINGS

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DOCKET NO. 211,637

John D. Clark, Administrative Law Judge
Philip S. Harness, Director